IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO. 539 OF 2005

M/s. Mangala International Pvt. Ltd,
A private Limited Company Incorporated
under the Provisions of the
Companies Act, 1956, having its
registered office at 161, Mittal Tower,
C-Wing, Nariman Point, Mumbai 400 021....Petitioners.
V/s
Mid-day Multimedia Ltd.
(formerly known as Mid Day Publications
Ltd), a Company incorporated under
the provisions of the Companies
Act, 1956, having its registered
office at 156, D.J. Dadajee Road,
Tardeo Mumbai-400034. ...Respondents.

Mr. D.J. Khambatta with Mr. Shah i/b Shal Legal for the petitioners.

Mr. D.D. Madon with Ms. Aarti Sathe i/b Madhur Baya for the respondents.

CORAM : S.J. VAZIFDAR, J.
DATE : 2ND MARCH, 2006.

P.C.

1. This is a petition under Sections 433 and 434 of the Companies Act, 1956 for winding up the Respondent Company.

2. According to the petitioners the company is indebted to it in the sum of Rs. 62,22,519 together

with interest at the rate of 21% per annum. The petitioners' claim is arises under a leave and licence agreement dated 19th December, 1995. Under the agreement the petitioner along with four other of its group companies granted leave and licence in favour of the company of commercial premises for an aggregate monthly licence fee of Rs. 7,90,000. Each of the licensors was entitled to 20% of the licence fee. The petitioners share therefore, came to Rs. 1,58,000 per month.

3. The company deposited a sum of Rs. 64,67,895 by way of security deposit. The duration of the agreement including extensions was till 15th August, 2004.

4. According to the petitioners the company wrongly retained possession of the premises till 25th November, 2005 and is liable therefore to pay licence fees till then. According to the petitioners the arrears of licence fees from August, 2004 till 25th March, 2005 is the indebtedness of the Company.

5. Admittedly the security deposit has not been returned. According to the Company they surrendered

possession of the premises on 3rd March, 2005. According to the petitioners, the company surrendered possession only on 25th November, 2005. The answer to this dispute requires a consideration of a letter dated 13th August, 2004 addressed by the Company to the petitioners, the petitioners reply thereto dated 30th August, 2004 and a letter dated 25th November, 2005 addressed by the Company to the petitioners.

6. By the letter dated 13th August, 2004, the Company in fact offered to surrender the premises and to hand over possession thereof to the petitioner in accordance with the terms of the leave and licence agreement dated 19th December, 1995. The Company requested the petitioner to confirm the return of the deposit amount of each of the licensors. By its reply dated 13th August, 2004 the petitioner accepted only conditionally the surrender of possession stating as under:

> "(Viii) The Security Deposit will be refunded to your clients as soon as the pending suit filed by the owners M/s. Saidpur Jute Co. Ltd. against our Lessors M/s. MBK Enterprises and your clients is finally disposed off with no adverse orders being passed against said MBK

> Enterprises.
>
> As your clients are aware, the said proceedings have been initiated by the owners against our Lessors M/s MBK Enterprises and your clients, as a result of the extensive work carried out by your clients which the owners allege to be additions and alterations of structural nature. Therefore, you will appreciate that the Security Deposit cannot be refunded till the said suit is finally disposed off with no adverse orders being passed against our Lessors, the said MBK Enterprises. However in order to show our bonafide we are prepared to deposit the security deposit in escrow with a mutually agreed person of repute on mutually agreed terms."

7. This raises the first dispute which, according to me is a bona-fide dispute. Were the petitioners justified in retaining the security deposit not towards the licence fees but towards the contingency of the result in the suit filed by the petitioners landlords?

8. It is important to note that the petitioners have refused to take a stand as to whether the company had in fact caused any damage to the petitioners or acted contrary to the agreement dated 19th December, 1995. The Petitioners have not alleged that the Company has in this regard acted contrary to and in breach of the agreement dated 19th December, 1995. They have not alleged that as a result thereof to wit as a result of any act on the part of the company the landlords or the

Petitioners have suffered any damages. Indeed the Petitioners are contesting the landlords suit. The petitioners have not specified the alleged breach on the part of the company. Clauses 9, 14 and 19 of the agreement reads as under:

> "9. The Licensee will take due care and caution and shall not do or cause anything to be done in the said premises which is likely to be a nuisance or annoyance to the other occupants of the said Sitaram Mills compound or which can cause any damage to the said premises or any part thereof.
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> "14. The Licensee shall not use the premises in such a way as to cause damage, apart from normal wear and tear. The Licensee will be responsible for maintenance of premises, surrounding areas and facilities during the leave and licence period. For property owned by the Licensee, the Licensee will take out necessary insurance and the Licensors will not be responsible.
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> "19. In the event of the Licensee committing breach of any of the terms and conditions of this Agreement, the Licensors are entitled to terminate this Agreement forthwith after giving prior notice in writing to the Licensee at the said premises. The notice will be sent under certificate of posting at the licensed premises and shall be deemed to be delivered to it in due course. In the event of the breach complained of in such notice not being substantially remedied by the Licensee within the said period stipulated by the Licensors this Licence shall automatically stand terminated and the Licensors shall be entitled to call upon the Licensee to remove itself, and agents, servants etc. and its/their articles and effects from the said premises."

It is not the petitioners case that for breach of clauses 9 and 14 they served a notice under clause 19 terminating the agreement.

9. Added to this is the fact that though the suit was filed in 1996, the agreement dated 19th December, 1995 was renewed/extended in 1998 and in 2001. Had it been the petitioners' case that the company had committed such serious breaches as alleged by the landlord it would not have done so.

10. Even before me the petitioner was not willing to take a stand in this regard. It is therefore, clearly not the petitioners case that the company was guilty of causing any damage to the premises.

11. The other point, also bona-fide disputed by the company is the date on which they handed over possession of the premises to the petitioners.

12. Firstly, that the company offered to hand over possession on the due date is, at least prima-facie, established for the above reasons.

13. Secondly, by the letter dated 25th November, 2005 the Respondent stated that it had vacated the premises on 3rd March, 2005 and that since then the petitioner had posted its security guard at the premises. The petitioner case that the company ultimately handed over the possession only on 25th November, 2005, is based on the company's statement in the Respondents' letter dated 25th November, 2005 that it was handing over the keys. The mere fact that the keys of the said premises were handed over under cover of the said letter is not decisive of the matter. They were only a duplicate set of keys.

14. Mr. Khambatta relied upon clause 17 of the agreement, which reads as under:

> "The Licensee shall have an option during the currency of the licence period to terminate the Leave and Licence at any time by paying compensation equal to 3 months licence fee in addition to the normal licence fee and a notice to that effect in writing. The deposit amount will be returned by the Licensors immediately on the Licensee vacating the premises, after adjustment of any dues under the Agreement."

15. It is moot point whether the Petitioner is entitled to make the adjustment only in respect of the arrears or even in respect of contingent claims. In

this case the claim is contingent upon the out come of the RAE suit filed by the landlord of the premises against the parties. Whether such a claim was contemplated by the parties is a question which also requires to be determined. Even assuming the Petitioners are entitled to adjust such claims against the deposit, in the facts of the case, at this stage and in a petition for winding up it would be an unwarranted presumption that the Company is bound to be held to be liable or responsible for the alleged breaches.

16. Mr. Khambatta further submitted that under the agreement the petitioners are entitled to claim damages at the rate of Rs. 100,000 per day for wrongful possession. Relying on the judgment of the Supreme Court in the case of **Oil and Natural Gas Corporation Ltd. V. SAW Pipes Ltd. AIR 2003 SC 2629**, he submitted that even at this stage, while considering the petition under sections 433 and 434 of the Companies Act the Court ought to proceed on the basis that the petitioners are entitled to damages at the rate of Rs. 100,000. I am unable to accept the submission.

17. Firstly as I have already held, there is a

bona-fide dispute as to whether the company in fact did not vacate and hand over the premises as per the terms of the agreement. In the circumstances, the question of the company being held, at this stage to be liable to pay compensation by way of liquidated damages or otherwise cannot and does not arise.

18. Moreover, in Saw Pipes the Supreme Court was considering a petition for setting aside an award passed by the learned Arbitrators in a dispute between the parties. That dispute was finally adjudicated after extensive, oral and documentary evidence was led and award was passed only after all the rival contention of the parties were considered. That stage has not reached before me. Nor I am able to infer that as and when the point arises for consideration the company will have no defence to the same.

19. In the circumstances, there are several bona-fide disputes. The petition is accordingly dismissed.